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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 68

JAMES FRANCIS HILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 69

JOHN MACHIBRODA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the court of appeals in *Hill* (H.R. 45) [1] is reported at 282 F. 2d 352. The memorandum of the district court (H.R. 41-43) is reported at 186 F. Supp. 441.

[1] References to the record in *Hill* v. *United States*, No. 68, are prefixed "H.R.", and to petitioner's brief, "H. Pet. Br." References to the record in *Machibroda* v. *United States*, No. 69, are prefixed "M.R.", and to petitioner's brief, "M. Pet. Br."

The *per curiam* opinion of the court of appeals in *Machibroda* (M.R. 59) is reported at 280 F. 2d 379. The memorandum of the district court (M.R. 47–57) is reported at 184 F. Supp. 881.

JURISDICTION

The judgment of the court of appeals in *Hill* was entered on June 14, 1960 (H.R. 45), and, in *Machibroda,* on June 6, 1960 (M.R. 59). The petition for a writ of certiorari in *Hill* was filed on June 30, 1960, and in *Machibroda,* on July 22, 1960, and both petitions were granted on March 20, 1961 (H.R. 46, 365 U.S. 841; M.R. 60, 365 U.S. 842). The grant in *Hill* was limited to question 1 stated below. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In both the *Hill* and the *Machibroda* cases: Whether the petitioner may seek relief in a collateral proceeding on the ground that the trial court, in violation of Rule 32(a), F.R. Crim. P., failed to inquire whether he had anything to say in his own behalf or had any information to present in mitigation of punishment before the imposition of sentence.

2. In the *Machibroda* case: Whether the trial court, on the basis of the files and records, properly denied without a hearing petitioner's contention that his plea of guilty had been involuntarily made and accepted in violation of Rule 11, F.R. Crim. P.

STATUTE AND RULES INVOLVED

Section 2255 of Title 28, United States Code, provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

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A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 35 of the Federal Rules of Criminal Procedure provides:

Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the

court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 11 of the Federal Rules of Criminal Procedure provides:

Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

[redacted]

Hill v. *United States*, *No. 68*

1. On November 10, 1952, petitioner was indicted in the United States District Court for the Eastern District of Tennessee under separate indictments charging transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312, and of a kidnapped person, in violation of 18 U.S.C. 1201. The district court refused to accept petitioner's plea of guilty, appointed counsel for him, and ordered a mental examination. After a hearing in open court, the court, on November 17, 1952, found petitioner to be mentally incompetent to stand trial and committed him to the custody of the Attorney General until such time as he should be competent to

stand trial. (H.R. 1, 9.) This finding was affirmed on appeal. Petitioner was confined to the United States Medical Center in Springfield, Missouri, but was later released to state authorities in Massachusetts where he was confined at the Bridgewater State Hospital. Following a habeas corpus proceeding, petitioner was adjudged sane on April 27, 1954, and the United States District Court for the District of Massachusetts entered an order directing his release unless removal proceedings were begun within one week thereafter. See *Hill* v. *United States*, 223 F. 2d 698, 700 (C.A. 6), certiorari denied, 350 U.S. 867.

Petitioner was thereupon returned to Tennessee for trial. The court appointed counsel for him. On May 6, 1954, petitioner entered a plea of not guilty by reason of insanity at the time of the commission of the alleged offenses. On June 2, 1954, the United States Attorney moved for a judicial determination of petitioner's competency. Following a hearing, the court ruled that petitioner was mentally competent to stand trial. (H.R. 2, 10.) On June 4, 1954, the jury returned a verdict of guilty on both counts (H.R. 3, 11). On the same day, petitioner was sentenced to imprisonment for twenty years for the transportation of the kidnapped person and to three years for the transportation of the stolen vehicle, the latter sentence to run consecutively to the former (H.R. 3, 11). No appeal was taken.

2. When the case was called for judgment on June 4, 1954, the court asked if the government cared to say anything. Government counsel replied that the government did not care to make a statement—

that the facts as to the defendant's character and criminal record had been developed by the proof at trial. The court inquired and received assurance that a codefendant had been sentenced to imprisonment for seventeen years. (H.R. 18.)

The court then observed that petitioner had been a puzzle to it for a long time and that it had studied and was familiar with petitioner's case and background. The court noted the adjudication on appeal of petitioner's incompetency and the many subsequent psychopathic examinations, and concluded, from all the psychiatric examinations, the lay testimony and its observations over several years, that petitioner was mentally and emotionally disturbed. Nevertheless, the court added that it believed petitioner knew what he was doing when he engaged in anti-social behavior and that the jury's verdict had been proper in every respect. (H.R. 19.)

Turning to the question of punishment, the court observed that the crime of kidnapping was a serious one and that therefore the punishment should be substantial (H.R. 19). Since, however, petitioner had already been incarcerated nineteen months in institutions at Springfield and in Massachusetts, the court decided that it would subtract two years from the twenty-five year sentence it originally had intended to impose. It then pronounced sentence as follows (H.R. 20):

> In the kidnapping case, twenty years sentence.
> In the Dyer Act case, three years.
> The kidnapping case to run first and the Dyer Act case to run consecutive with the kidnapping case.

That terminates it so far as the present is concerned. Remand Mr. Hill to the marshal.

3. The present proceeding arises from the denial of petitioner's fourth motion, pursuant to 28 U.S.C. 2255, collaterally attacking his conviction.[2]

In the present motion, petitioner asserted numerous errors, including the denial of the right to make a statement in his own behalf before sentencing, in violation of Rule 32(a), F.R. Crim. P. (H.R. 26–31)—an issue previously raised in the third proceeding (see 268 F. 2d 203, certiorari denied, 361 U.S. 854). The district court found, on the basis of the files and records, that petitioner was not entitled to relief, and noted that most of the questions raised had been passed upon previously and had been found lacking in merit (H.R. 41–43, 186 F. Supp. 441). The court of appeals, after oral argument, affirmed on the basis of the district court's opinion (H.R. 45, 282 F. 2d 352). This Court granted a petition for a writ of certiorari limited to "the question of whether petitioner may raise his claim under Federal Criminal Rule 32(a) in the proceeding which he has now brought" (H.R. 46, 365 U.S. 841).[3]

[2] Prior proceedings are reported at 223 F. 2d 699, certiorari denied, 350 U.S. 867; 238 F. 2d 84, certiorari denied, 352 U.S. 1007; 256 F. 2d 957, 268 F. 2d 203, certiorari denied, 361 U.S. 854.

[3] Since the granting of this petition for a writ of certiorari, petitioner filed yet another petition with this Court (No. 295 Misc., this Term) in which he asked for certiorari to review the affirmance of the order of denial without a hearing of a motion purportedly made under Rule 36, F.R. Crim. P.—a motion alleging, *inter alia*, that petitioner had not been afforded the right, under Rule 32(a), to speak before sentencing. The petition was denied on October 9, 1961.

1. In 1956, in the United States District Court for the Northern District of Ohio, two informations in two counts each were filed, charging petitioner with having robbed two different banks at Waterville and Forest, Ohio, respectively. Count One of each information charged petitioner with having entered a federally insured bank with intent to commit larceny, and Count Two charged him with having jeopardized the lives of bank employees by the use of dangerous weapons, in violation of 18 U.S.C. 2113 (a) and (d), respectively. (M.R. 8.)

In January 1956, petitioner, a Canadian citizen, appeared before a Canadian court with counsel, waived his rights to formal extradition, and consented to return to Toledo, Ohio, to answer the bank robbery charges.

In his first appearance on February 17, 1956, before Judge Kloeb of the federal district court in Ohio, petitioner was represented by two counsel of his own choice (M.R. 35–38). Government counsel read the first of the informations proposed to be filed, copies of which had previously been furnished defense counsel (M.R. 35–36). Government counsel asked, "Do you understand that these counts in the information charge you with serious felonies?", and then explained the right of indictment by grand jury and the right of waiver of indictment. In answer to specific inquiry, petitioner indicated that it was his desire to sign the waiver of indictment. (M.R. 36.) Petitioner's counsel assured the court that he had examined the charges carefully and had consulted his client about

them. Counsel indicated that he would like to defer entering a plea in order to talk with government counsel about the possibility of another information being filed against petitioner. (M.R. 37.)

On February 24, 1956, petitioner, represented by experienced counsel, again appeared before Judge Kloeb (M.R. 39–41). At this time, the second information was read, and the right to indictment or waiver was again explained by government counsel. Again, petitioner signed, and assured the court that he desired to sign the waiver of indictment. The informations were filed and petitioner, through counsel, entered a plea of guilty to each. With respect to both informations petitioner personally answered, "Yes, Your Honor," when asked by the court if he desired to plead guilty. (M.R. 40.) Thereafter, the court indicated that it would like to have a presentence report and continued the case for that purpose (M.R. 40–41).

On May 1, 1956, petitioner, with his counsel present, appeared before Judge Kloeb again—this time to testify in defense of a co-defendant, Marvin Breaton, charged jointly with him and found by a jury to have been guilty of the commission of the Waterville bank robbery.* Petitioner testified that he had robbed the Waterville bank but denied that Breaton had been with him. (M.R. 48–49.)

On May 23, 1956, when petitioner, with counsel, appeared before Judge Kloeb for sentencing, the following transpired (M.R. 42–43):

*Petitioner's testimony at the trial of his co-defendant is not a part of the record. Since the printing of the record, the government has had this testimony transcribed and it is available if the Court should desire to examine it.

> The Court: Does counsel for the defendant have anything to say in this matter?
> Mr. Schuchmann [defense counsel]: No. Your Honor, I believe this is my fourth appearance here with the defendant.
> The Court: That is correct. Mr. Machibroda, I have had a complete report in your case since you were brought over here and entered your pleas. * * *

The court then told petitioner that the reports indicated his participation in some four robberies yielding $169,432.54. It observed that this was "quite a business" for a twenty-six year old man to be in, that it did not think he would ever correct himself, and that he ought to be confined until he was fifty or sixty years old by which time perhaps he would be able to live with the society which now needed protection from him. The court told petitioner that the intimidation of helpless women and elderly men with the use of guns was not bravery but cowardice.

Petitioner was then sentenced, on the first information, to terms of imprisonment of twenty-five years on Count Two, and to twenty years on Count One, to be served concurrently (M.R. 5–6); and, on the second information, to fifteen years imprisonment on each of Counts One and Two to be served concurrently with each other but consecutively to the term of imprisonment imposed on the first information (M.R. 11–12).

2. On November 30, 1956, some six months after sentence, petitioner, then in Leavenworth, wrote Judge Kloeb (M.R. 55–56) asking the court to make his sentences concurrent. In the letter, petitioner

noted that, at the time of sentencing, because of his obduracy and pride, he had appeared to the court as "a young maniac with no apparent respect for authority * * *." As a result, he acknowledged, the court had sent him "away for good because there seem[ed] no chance that he could ever be a law-abiding person." Petitioner finally expressed extreme remorse and his "great desire" to be accepted by the society which he said he had flouted. The letter was referred to the probation officer who wrote petitioner that the matter was now outside the jurisdiction of the court and "strictly in the hands of the Federal Parole Board." (M.R. 57.)

3. On February 9, 1959, approximately three years after sentencing, petitioner filed a motion to vacate sentence with an attached affidavit, pursuant to 28 U.S.C. 2255, in which he alleged that the sentencing court had not afforded him the opportunity to make a statement in his own behalf, in compliance with Rule 32(a), F. R. Crim. P., and that his waiver of his right to be tried by indictment for the second robbery, and his pleas of guilty to both informations, were entered as a result of an interview in the county jail in Toledo on February 21, 1956, with Clarence M. Condon, Assistant United States Attorney (M.R. 13–23). Mr. Condon allegedly represented himself as having authority to speak for the United States Attorney and the district court, and cautioned petitioner not to advise his attorney of the interview. According to petitioner, Mr. Condon promised that, if petitioner would execute the waiver and plead guilty, the court would not impose a sentence in excess of twenty years

in the first case and ten years in the second case, and that the two sentences would run concurrently.

Petitioner also asserted that Mr. Condon visited him again in the jail on May 22, 1956, at which time he mentioned that the court was vexed because of petitioner's testimony at the trial of the co-defendant Breaton and that there might be some difficulty in regard to their previous agreement. Petitioner then related that he became agitated and threatened to tell his attorney and the court of the agreement. Mr. Condon then promised that, in the event a sentence in excess of twenty years was imposed, the United States Attorney would move within sixty days for a reduction of the sentence; that petitioner had nothing to worry about if he kept quiet; but that, if he insisted on making a scene, certain unsettled matters concerning two other robberies would be added to his present difficulties.

Petitioner further maintained that, immediately after sentencing, Mr. Condon assured him that he would have the sentence reduced to twenty years as soon as the judge "cooled off." Finally, petitioner claimed that he had written two letters to the sentencing court and two letters to the Attorney General informing them of the misrepresentations by Mr. Condon.

The government filed a memorandum in opposition to the motion to vacate (M.R. 24–32), attaching an affidavit of Clarence M. Condon, which emphatically denied that Condon had ever discussed a plea with petitioner, or coerced or promised him anything (M.R. 33–34). According to the affidavit, the only

time Condon had ever mentioned a sentence to petitioner, or had in fact ever seen petitioner outside of the courtroom, was on the afternoon before Breaton's trial, at which time Condon reminded petitioner that he was being given the last opportunity to tell the truth and that the court, in sentencing, might well take into consideration petitioner's refusal to talk.

The court denied the motion without a hearing, finding on the basis of the files and records that the circumstances at sentencing were such as to entitle petitioner to no relief upon his allegation that the court had not complied with Rule 32(a). Moreover, in a comprehensive memorandum, Judge Kloeb, reviewing all the files and records, including the transcripts of petitioner's appearances before him, found petitioner's story of an agreement made with the Assistant United States Attorney to be false. (M.R. 47–55, 184 F. Supp. 881.) The court noted that it had never received either of the two letters which petitioner swore he had addressed to the court apprising it of the alleged agreement (M.R. 49), and quoted verbatim the letter which it had received from petitioner six months after sentencing (M.R. 50–52), which made no mention of any agreement but rather requested an adjustment in sentence downward to twenty-five, not twenty, years (M.R. 53). The court finally noted petitioner's long silence and reasoned that, had government counsel promised to move for reduction of sentence from forty to twenty years within sixty days after sentence, a failure so to move "would have brought forth a cry of anger and anguish" from petitioner (M.R. 50). The court did not

specifically rely on Mr. Condon's affidavit. The court of appeals affirmed (M.R. 59, 280 F. 2d 379), and this Court granted certiorari (M.R. 60, 365 U.S. 842).

SUMMARY OF ARGUMENT

I

The failure of the sentencing courts in these two cases to observe the formal requirements of Rule 32(a), F.R. Crim. P., with respect to the petitioners' rights of allocution, is an issue cognizable only upon direct appeal; the errors are not correctible by any postconviction remedy, be it habeas corpus or a motion under 28 U.S.C. 2255 or Rule 35, F.R. Crim. P.

A. The writ of habeas corpus has been sparingly issued with respect to matters occurring during the course of trial, and is available, if at all, only with respect to errors of a fundamental jurisdictional or constitutional character. Noncompliance *per se* with a procedural rule in sentencing has had no place among the extraordinary abuses which have necessitated the invocation of the writ of habeas corpus.

The remedy afforded by 28 U.S.C. 2255 is the substantive equivalent of the writ of habeas corpus. The "sole purpose" of its enactment "was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum," *i.e.*, the place of sentencing rather than the place of confinement. *United States* v. *Hayman*, 342 U.S. 205, 219. The legislative history of Section 2255 makes it clear that the remedy which it was to afford was to be broader in scope than the limitations of *coram nobis* at common law, and as broad as,

but no broader than, the remedy afforded by habeas corpus. Thus, the lower courts have consistently held that a collateral attack under Section 2255 may be sustained only upon grounds which would warrant the granting of a writ of habeas corpus.

The violation of the right of allocution guaranteed under Rule 32(a) is no more than a violation of a rule of practice, which, because it does not in and of itself involve constitutional rights or jurisdictional defects, may not be urged as a basis for collateral attack by an application for a writ of habeas corpus or a motion under 28 U.S.C. 2255. Although noncompliance with some Rules of Criminal Procedure may render a judgment subject to collateral attack, that is not because the particular rules themselves are violated, but because the rules embody or restate certain fundamental constitutional safeguards, a violation of which may deprive the defendant of guarantees of due process or which may undermine the jurisdiction of the court. A violation of Rule 43, requiring the presence of a defendant at every stage of the trial, or Rule 44, requiring the court to advise the defendant of his right to counsel, is an example of the type of noncompliance which may render a judgment subject to collateral attack. Similarly, a violation of Rule 11, which prohibits the court from accepting a plea of guilty without first determining that the plea is voluntarily and intelligently made, is subject to collateral review, not to determine whether the court followed the exact formula or ritual prescribed by the rule, but rather to determine the constitutional dimension of the violation.

On the other hand, noncompliance with other rules, which embody only sound practice, may not serve as a basis for collateral attack. Thus where an accused is aware of the substance of the charge against him, the courts have not considered a technical violation of Rule 10, which protects the right of an accused to be arraigned in open court and to be informed of the nature and cause of the accusation against him, as a jurisdictional defect subject to attack under 28 U.S.C. 2255. Similarly, since the failure of the courts in the present cases to accord petitioners their right of allocution under Rule 32(a) is not the type of flagrant error or omission which would result in a void judgment or a complete miscarriage of justice, the violation should not serve as the occasion to extend the motion to vacate under 28 U.S.C. 2255 beyond its historical bounds.

B. Rule 35, F.R. Crim. P., provides a remedy even more narrow in scope than either habeas corpus or 28 U.S.C. 2255. It is available only to correct an illegal sentence. An "illegal" sentence is confined to the narrow class of sentences which, on the face of the record, do not comply with the criminal statutes which authorize them. Since, historically, the record by which a sentence has been determined to be illegal was considered to be only the common law judgment roll, which included mainly the indictment, the plea, the verdict and the sentence, the common law record would not serve as a basis of determining whether a court had accorded an accused the right of allocution. Since Rule 35 was intended to continue existing law, it cannot serve as a remedy for a violation of Rule 32(a).

To say that a sentence was illegal because of some error of commission or omission of the trial judge at any stage of the proceeding would be totally incompatible with the whole historical development of the remedy for setting aside an illegal sentence, culminating in Rule 35.

II

On the face of the record in *Machibroda* case, petitioner's bare allegations that he was induced to enter a plea of guilty by the promise of leniency of the Assistant United States Attorney entitles him neither to a hearing nor to relief. Sufficient averments of fact set forth in a motion under 28 U.S.C. 2255 must be accepted as true only insofar as they are not inconsistent with the record, for Section 2255 permits summary dismissal if "the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief."

The district court specifically found that the motion, files and records refuted petitioner's assertions. The record supports this finding and leaves no room for doubt that petitioner's plea was made deliberately and with understanding. The court's conclusion is reinforced by certain recitations in petitioner's motion which the court of its own personal knowledge concluded were untrue. The judge had never received the two letters allegedly sent by petitioner apprising the court of the prosecutor's promise. Moreover, the letter the judge did receive, six months after sentencing, made no mention of the prosecutor's alleged promise of leniency.

The grounds and allegations in petitioner's motion are tailor-made to meet his lack of supporting data and inconsistency of conduct. Every averment is so stated that there is no possibility of outside corroboration, as for instance that his "conversations" with the prosecutor were known to no third party. To require a hearing under these circumstances, simply because the allegations were made, would mean that the number of hearings or motions under Section 2255 would be limited only by the imagination and ingenuity of the prisoners involved. Neither Section 2255 nor *United States* v. *Hayman, supra,* imposes such a requirement.

Finally, the procedure followed by the court in ascertaining whether petitioner fully understood the charges and desired to enter the plea constituted adequate compliance with Rule 11. The whole pattern of petitioner's conduct—his act of surrender to the jurisdiction in waiving extradition, his assurances in open court as to his desires, his contrite letter to the court following sentence—showed voluntariness and volition.

ARGUMENT

I

NEITHER PETITIONER IS ENTITLED IN A COLLATERAL PROCEEDING TO RELIEF FROM SENTENCES IMPOSED IN VIOLATION OF THE RIGHT OF ALLOCUTION GUARANTEED BY RULE 32(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

In *Green* v. *United States,* 365 U.S. 301, eight members of this Court held that Rule 32(a), F. R. Crim. P. (*supra,* pp. 4–5), which provides that "[b]efore im-

posing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment," requires "that the defendant be personally afforded the opportunity to speak before imposition of sentence" (365 U.S. at 304; see *id.* at 307). Only Mr. Justice Stewart accepted the government's position that an opportunity afforded to counsel might fulfill the obligation of the Rule, even though the better practice was "to assure the defendant an express opportunity to speak for himself" (*id.* at 306). Four members of the Court,[5] however, thought the record to be too ambiguous to show that Green had not been afforded a personal opportunity to speak. On consideration of Green's motion under Rule 35, F. R. Crim. P. (*supra*, p. 4), therefore, the majority of the Court affirmed Green's conviction without specifically deciding whether the question of the violation of Rule 32(a) could be raised on collateral attack and whether the violation "would constitute an error *per se* rendering the sentence illegal" (365 U.S. at 303; see *id.* at 304–305). That question is before the Court in the present cases.[6]

Petitioners impliedly concede that the failure of the trial courts expressly to afford petitioners their right of allocution under Rule 32(a) would not have been an error cognizable by an application for a writ

[5] Mr. Justice Frankfurter, joined by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker.

[6] As to relief on direct appeal from a sentence imposed in violation of Rule 32(a), see *Van Hook* v. *United States*, 365 U.S. 609.

of habeas corpus prior to 28 U.S.C. 2255. They therefore seek relief by motions under Section 2255 (*supra*, pp. 3–4) (see M. Pet. Br. 20–28; H. Pet. Br. 22). They further argue in the alternative, citing *Heflin* v. *United States*, 358 U.S. 415, that the Court may treat their motions under 28 U.S.C. 2255 as motions seeking relief under Rule 35 (see H. Pet. Br. 12–21; M. Pet. Br. 20).[7] In contrast, the government contends that a court's failure to observe the formal requirements of Rule 32(a) is an issue cognizable only upon direct appeal, and that the error is not correctible by any post-conviction remedy, be it habeas corpus or a motion under 28 U.S.C. 2255 or Rule 35. The government concedes at the outset that neither petitioner was personally afforded the opportunity to speak before imposition of sentence as that right under Rule 32(a) was construed in *Green* v. *United States*, *supra*.

A. THE FAILURE OF THE TRIAL COURTS TO COMPLY WITH RULE 32(a) IS NOT COGNIZABLE ON HABEAS CORPUS OR UNDER 28 U.S.C. 2255

1. *The scope of the writ of habeas corpus.*—The scope of the writ of habeas corpus in modern times cannot easily be compressed into a rigid rule or a set formula; nevertheless, as to matters occurring during the course of trial, which can be corrected on direct appeal, the writ is sparingly issued and is available,

[7] In *Hill*, the Court granted certiorari limited to the question whether petitioner could raise his claim of noncompliance with Rule 32(a) "in the proceeding which he has now brought" (H.R. 46, 365 U.S. 841). The government does not challenge petitioner's conclusion (H. Pet. Br. 12) that this language may be construed to mean a proceeding seeking relief under either Section 2255 or Rule 35.

if at all, only with respect to errors of a fundamental jurisdictional or constitutional character. See *Sunal* v. *Large*, 332 U.S. 174; *Bowen* v. *Johnston*, 306 U.S. 19. See also the brief for the United States in *Hodges* v. *United States*, No. 58, this Term, at pp. 35–36, 48, 52–56. In *Sunal* v. *Large*, an incorrect trial ruling that a defendant could not offer a defense which, under subsequent decisions, should have been available to him was deemed correctible only by direct appeal, and not on collateral attack, for, as the majority held, the writ will not substitute for an appeal other than in "exceptional circumstances" (332 U.S. at 184). Even the dissenting Justices agreed that trial errors ordinarily would not fall within the scope of the writ, since the writ was available whenever necessary "'to prevent a complete miscarriage of justice'" (*id.* at 187, 188). Thus, with respect to legality of sentence or matters of confinement, the writ has been held to be properly invoked only when the court inherently lacked jurisdiction as when its power to sentence was at an end (see *Ex parte Lange*, 18 Wall. 163), when it exceeded its power to sentence (see *In re Bonner*, 151 U.S. 242), or when its sentence exceeded the maximum provided by statute. But a misrecital in a verdict has been held to be no more than an irregularity not affecting jurisdiction. *Ex parte Wilson*, 114 U.S. 417, 421. On its face, therefore, noncompliance *per se* with a procedural rule in sentencing has no place among the extraordinary abuses which have necessitated the invocation of the writ of habeas corpus.

2. *The remedy afforded by 28 U.S.C. 2255 is the substantive equivalent of the writ of habeas corpus.*—

Section 2255 (*supra*, pp. 3–4) permits a prisoner in federal custody to "move the court which imposed the sentence to vacate, set aside or correct the sentence" upon a claim that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack * * *." If the sentencing court, after following prescribed procedures, finds "that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack * * *," the court must grant appropriate relief.

Section 2255 was enacted in 1948 as a part of Chapter 153 (Habeas Corpus) of the revision of the Judicial Code, upon the recommendation of the Judicial Conference of the United States. The section incorporates the language of bills prepared by the Judicial Conference Committee on Habeas Corpus Procedure. The history of Section 2255, as detailed in *United States* v. *Hayman*, 342 U.S. 205, 214–219, indicates that the statutory remedy was prompted by the concern of the Judicial Conference about the large volume of frivolous and repetitive applications for habeas corpus. Since these applications were required to be filed in the districts of confinement, rather than the districts where the sentences had been imposed, they continually caused burdensome administrative

problems involving the production of records and witnesses. See also Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171. According to the Court in *Hayman* (342 U.S. at 219): "[T]he sole purpose of [Section 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."

In order to buttress their argument that Section 2255 was intended to provide a broader scope of review than habeas corpus, petitioners mistakenly rely upon language in the section that relief may be claimed upon the ground that the sentence "is otherwise subject to collateral attack" (M. Pet. Br. 21; see H. Pet. Br. 22). But this clause in Section 2255 was only to make it clear that the statutory remedy was as broad as, but no broader than, habeas corpus.

Although habeas corpus was the normal method of collateral attack on judgments of conviction in the federal courts prior to Section 2255, a number of prisoners had attempted to gain post-conviction and post-appeal review of their convictions by a motion in the sentencing court in the nature of a common law writ of error *coram nobis*. Whether the remedy existed and whether its scope was as broad as habeas corpus were unsettled questions.[8] Insofar as the new remedy, embodied in Section 2255, covered post-conviction remedies of a prisoner in custody,[9] how-

[8] See, *e.g.*, *Kelly* v. *United States*, 138 F. 2d 489 (C.A. 9), certiorari denied, 324 U.S. 855; *United States* v. *Steese*, 144 F. 2d 439 (C.A. 3); *Crowe* v. *United States*, 169 F. 2d 1022 (C.A. 4).

[9] See *United States* v. *Morgan*, 346 U.S. 502; *Heflin* v. *United States*, 358 U.S. 415.

ever, it was specifically intended to be broader in scope than the limitations of *coram nobis* at common law. In a statement prepared at the request of the Chairman of the House and Senate Judiciary Committees, the Habeas Corpus Procedure Committee of the Judicial Conference explained:[10]

> This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader, than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is "open to collateral attack." *As a remedy, it is intended to be as broad as habeas corpus.* [Emphasis added.]

The lower courts have consistently held that a collateral attack under Section 2255 may be sustained only upon grounds which would warrant the granting of a writ of habeas corpus.[11] As in habeas

[10] Quoted in *United States* v. *Hayman*, *supra*, 342 U.S. at 216–217. The pertinent portions of this statement were incorporated in the Judiciary Committee's favorable report on S. 20, S. Rep. No. 1526, 80th Cong., 2d Sess., pp. 2–3.

[11] See, *e.g.*, *Larson* v. *United States*, 275 F. 2d 673 (C.A. 5), certiorari denied, 363 U.S. 849; *United States* v. *Kelly*, 269 F. 2d 448 (C.A. 10), certiorari denied, 362 U.S. 904; *Black* v. *United States*, 269 F. 2d 38, 41 (C.A. 9), certiorari denied, 361 U.S. 938; *Kreuter* v. *United States*, 201 F. 2d 33, 35 (C.A. 10); *Birtch* v. *United States*, 173 F. 2d 316, 317 (C.A. 4) (opinion joined by Judge Parker, the author of the legislation); *Taylor* v. *United States*, 229 F. 2d 826 (C.A. 8), certiorari denied, 351 U.S. 986 (opinion by Judge Stone, also of the Judicial Conference Committee); *United States* v. *Edwards*, 152 F. Supp. 179 (D.D.C.), affirmed, 256 F. 2d 707 (C.A.D.C.), certiorari denied, 358 U.S. 847. See also 4 Barron (and Holtzoff), *Federal Prac-*

corpus, a motion under the statute is not a substitute for appeal.[11] Failure to appeal and evidence of conscious election not to appeal may in fact bar resort to Section 2255.[12] Moreover, even in those funda-

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tice and Procedure (Rules ed.), Sec. 2306; Note, 59 Yale L.J. 786, 789.

The cases which petitioners cite (M. Pet. Br. 23) do not stand for the proposition that Section 2255 provides a broader remedy than was available under habeas corpus. None of the decisions says this; the factual situations do not imply this. Thus, the circumstances in *Poole* v. *United States*, 250 F. 2d 396 (C.A.D.C.), showed a totality of serious errors including the acceptance of a plea of guilty made without benefit of counsel and improper and misleading judicial directives regarding a subsequent request for withdrawal; *Pugh* v. *United States*, 212 F. 2d 761 (C.A. 9), involved a conviction obtained without indictment in the district court in Guam, which the court compared to a conviction based upon an indictment stating an offense not punishable by federal statute; *United States* v. *Russo*, 260 F. 2d 849 (C.A. 2), stands for the proposition that matters regarding the extent of a bill of particulars are reviewable on appeal; *Brooks* v. *United States*, 223 F. 2d 393 (C.A. 10), involved an appeal from the denial of a writ of error *coram nobis* where a sentence on one count was void and on another equivocal. All of these issues would presumably have been cognizable under habeas corpus.

[11] See *Killibrew* v. *United States*, 275 F. 2d 308 (C.A. 5); *Edwards* v. *United States*, 256 F. 2d 707 (C.A.D.C.), certiorari denied, 358 U.S. 847; *Clark* v. *United States*, 273 F. 2d 68 (C.A. 6), certiorari denied, 362 U.S. 979; *Banks* v. *United States*, 258 F. 2d 318 (C.A. 9), certiorari denied, 358 U.S. 886; *United States* v. *Rosenberg*, 200 F. 2d 666 (C.A. 2), certiorari denied, 345 U.S. 965.

The question whether the admission into evidence of a coerced confession is properly the subject of a collateral attack is now pending in this Court. *Hodges* v. *United States*, No. 58, this Term.

[12] See *Larson* v. *United States*, 275 F. 2d 673 (C.A. 5), certiorari denied, 363 U.S. 849; *Kyle* v. *United States*, 266 F. 2d 670 (C.A. 2), certiorari denied, 361 U.S. 870.

mental areas where relief under a post-conviction remedy is available, the burden is on the prisoner to show that the facts merit the extraordinary relief. Thus, with respect to the allegation of ineffective assistance of counsel, mere improvident strategy, bad tactics, a mistake, carelessness, or inexperience do not necessarily warrant relief unless the trial, taken as a whole, was considered a "mockery of justice." [14]

3. *A violation of the right of allocution is not cognizable under Section 2255.*—The failure of a trial court to ask a defendant whether he has anything to say before sentence is not an error with the scope, character, or magnitude of the errors cognizable on collateral attack by habeas corpus or by a motion under 28 U.S.C. 2255.

(*a*). The error in the courts below was one known and capable of being raised on appeal; no question of the jurisdiction or the competency of the courts is raised; and the sentence was within the power of the court to impose and within the maximum permitted by the statute (see *supra*, pp. 21–22).

Moreover, in the present cases, there is no question of a violation of a specific constitutional guaranty. The right embodied in Rule 32(a), and affirmed in *Green* v. *United States, supra,* had its genesis in the English common law practice of allocution—a prac-

[14] See *Edwards* v. *United States*, 256 F. 2d 707, 708 (C.A. D.C.), certiorari denied, 358 U.S. 847; *Mitchell* v. *United States*, 259 F. 2d 787 (C.A.D.C.), certiorari denied, 358 U.S. 850. As to the burden of showing knowing use of perjured testimony, see *Black* v. *United States*, 269 F. 2d 38, certiorari denied, 361 U.S. 938; *Taylor* v. *United States*, 299 F. 2d 826 (C.A. 8), certiorari denied, 351 U.S. 986.

tice necessary at a time when a person convicted of a felony was not permitted to have counsel to defend him. Up until the time of the *Green* decision, the federal courts had not generally held the practice of allocution to be subject to strict literal enforcement, except with respect to capital cases. See *Ball* v. *United States,* 140 U.S. 118; *United States* v. *Austin-Bagley Corp.,* 31 F. 2d 229 (C.A. 2); *Sandroff* v. *United States,* 174 F. 2d 1014 (C.A. 6), certiorari denied, 338 U.S. 947. The failure to follow this practice, where the defendant had counsel to speak for him, was clearly not action or inaction "inconsistent with the rudimentary demands of justice".[15] In view of the safeguards protecting an accused person under present day judicial procedure—the right to representation by counsel, the opportunities afforded to move for a new trial or in arrest of judgment and to file exceptions, and the right of appeal—it is difficult to imagine how the courts' failure to direct the traditional inquiry could result *per se* in the deprivation of a fair opportunity to present facts and argument relevant to the sentence, which would be the limit of the substantive constitutional right.[16] Certainly the error alleged in the present cases does not begin to approach in potential effect the seriousness of the trial error in *Sunal* v. *Large, supra,* which was held not to be remediable on collateral attack (see *supra,* p. 22). The violation of the right of allocution is no more than breach of a rule of practice.

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[15] *Mooney* v. *Holohan,* 294 U.S. 103, 112.

[16] See *Garland* v. *Washington,* 232 U.S. 642, 645–646.

(*b*). Failure to comply with every Rule of Criminal Procedure is not in itself so basic an error as to require vacation of sentence. To be sure, there are some rules, such as Rule 43, requiring the presence of a defendant at every stage of the trial, or Rule 44, requiring the court to advise the defendant of his right to counsel,[17] which restate fundamental constitutional rights; noncompliance with these rules may render a judgment subject to collateral attack because it undermines the basic jurisdiction of the court.

Similarly a violation of Rule 11 (*supra*, p. 5), which prohibits the court from accepting a plea of guilty without first determining that the plea is made voluntarily and with understanding of the nature of the charge, is subject to review on collateral attack. The review is not accorded, however, merely for a literal violation; the Rule does not require a court to follow any particular ritual or any special form of words (see *infra*, p. 42). Rather, review is granted only to determine whether the accused has been deprived of his liberty without due process of law.

But noncompliance with other Rules, which embody procedural safeguards, may not serve as a basis for vacation of a judgment. Thus, Rule 10 protects the right of an accused to be arraigned in open court and to be informed of the nature and cause of the accusation against him. The rule is based, not only

[17] Significantly, both of these rules recognize conditions under which the rights which they protect may be waived. With respect to Rule 43, see *Lewis* v. *United States*, 146 U.S. 370; *Diaz* v. *United States*, 223 U.S. 442; *Snyder* v. *Massachusetts*, 291 U.S. 97; *Price* v. *Johnston*, 334 U.S. 266. With respect to Rule 44, see *Johnson* v. *Zerbst*, 304 U.S. 458.

upon common law practice, but upon the express language of the Sixth Amendment." Yet the courts, relying on this Court's holding in *Garland* v. *Washington*, 232 U.S. 642, that, where the accused is aware of the substance of the charge against him, the technical right to formal arraignment and plea is not an essential element of due process, have held that failure to follow the procedure prescribed by Rule 10 is not a jurisdictional defect. In *Ray* v. *United States*, 192 F. 2d 658, 659, the Fifth Circuit, faced with the contention that an accused was not furnished a copy of an indictment, held that "the omission * * *, even if error remediable on direct appeal, does not render the judgment subject to collateral attack under 28 U.S.C.A. 2255." In *Merritt* v. *Hunter*, 170 F. 2d 739 (C.A. 10), the accused contended that the failure of the court to call upon him to plead out of his own mouth deprived the court of jurisdiction. The court replied (*id.*, at 741):

> Obviously, arraignment in accordance with Rule 10 is intended to be a safeguard for due process—a pattern for a fair hearing. It is only when failure to observe this safeguard amounts to denial of due process that the court is deprived of jurisdiction. The fair administration of justice does not depend upon such procedural niceties.

Accord, *United States* v. *Denniston*, 89 F. 2d 696 (C.A. 2), certiorari denied, 301 U.S. 709; *Mayes* v. *United States*, 177 F. 2d 505 (C.A. 8).

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[11] See *Simons* v. *United States*, 119 F. 2d 539 (C.A. 9), certiorari denied, 314 U.S. 616.

(*c*). With respect to Rule 32(a), what clear judicial authority there was prior to the Court's decision in the *Green* case, *supra,* was to the effect that the claim of non-compliance with Rule 32(a) is a matter not subject to review in a collateral proceeding. See *Parker v. United States,* 248 F. 2d 803 (CA. 4), certiorari denied, 355 U.S. 963; *Mixon* v. *United States,* 214 F. 2d 364 (C.A. 5). The decisions cited by petitioner (M. Pet. Br. 24–25) are of little help.[19] For the most part, the courts found it unnecessary to consider the issue raised in the present cases because they considered the substantive claim of non-compliance with Rule 32(a) so plainly without merit.[20] In some of the decisions, there is even the suggestion that the issue is not one to be raised long after conviction.[21] Although certain courts, purporting to rely on the *Green* case, have assumed that a violation of the right

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[19] But see *Couch* v. *United States,* 235 F. 2d 519 (C.A.D.C.), in which the court, in affirming the denial of a motion under 28 U.S.C. 2255 raising the issue of allocution under Rule 32(a), adopted the practice of allocution as a new procedure to operate prospectively only. In a concurring opinion in *Couch,* four judges suggested that failure to follow the procedure under Rule 32(a) would be "in some circumstances at least as to trials and convictions occurring after the rendition of today's opinion" a matter requiring resentencing when urged under Section 2255 (235 F. 2d at 521). In *Jenkins* v. *United States,* 249 F. 2d 105 (C.A.D.C.), the court followed this procedure with respect to sentences coming after the *Couch* decision.

[20] See *United States* v. *Galgano,* 281 F. 2d 908 (C.A. 2), certiorari denied, 355 U.S. 883; *United States* v. *Miller,* 158 F. Supp. 261 (S.D.N.Y.); *United States* v. *Sousa,* 158 F. Supp. 508 (S.D.N.Y.).

[21] See *id.* at 510; *United States* v. *Carminati,* 25 F.R.D. 31 (S.D.N.Y.), affirmed *sub nom. United States* v. *Galgano, supra.*

of allocution is cognizable in a proceeding under Section 2255," this Court in *Green* did not so hold. Indeed, subsequent to the decision in the *Green* case, the Court granted certiorari in the present cases to decide that very issue.

The government does not question the importance of "the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." Nor does it disagree that a defendant might be more persuasive than counsel were he to speak for himself. *Green* v. *United States, supra,* 365 U.S. at 304. Moreover, the government does not question the right of a defendant, on direct appeal, to have a judgment against him reversed and the cause remanded for resentencing if he had not been granted the personal right of allocution in accordance with the literal terms of Rule 32(a). See *Van Hook* v. *United States,* 365 U.S. 609. What the government does question is the right of a defendant to invoke a literal violation of Rule 32(a) as the occasion to extend 28 U.S.C. 2255 beyond its historical bounds in order to permit resentencing, possibly years after conviction. Clearly, the mere failure of the courts in the present cases to accord petitioners the right personally to speak in their own behalf or to present information in mitigation of punishment is not the type of flagrant error or omission which would result in a void judgment, a "complete miscarriage of justice," or a fundamental defect, especially where both petitioners were repre-

[11] See *Jenkins* v. *United States,* No. 18783, C.A. 5, decided Aug. 16, 1961; *Domenica* v. *United States,* 292 F. 2d 483 (C.A. 1); *United States* v. *Donovan,* Cr. No. 145-191, S.D.N.Y.

sented by experienced counsel, both courts were thoroughly familiar with petitioners' past history and background, and, at least in the *Machibroda* case, the counsel had been asked by the court whether he had anything to say.

B. THE FAILURE OF THE TRIAL COURTS TO COMPLY WITH RULE 32(a) DOES NOT RESULT IN AN ILLEGAL SENTENCE SUBJECT TO CORRECTION UNDER RULE 35.

1. *The general scope of Rule 35.*—Rule 35, F.R. Crim. P., provides a remedy even more narrow in scope than either habeas corpus or 28 U.S.C. 2255. It is available only to correct an *illegal* sentence. See *Heflin* v. *United States,* 358 U.S. 415; *Cuckovich* v. *United States,* 170 F. 2d 89 (C.A. 6), certiorari denied, 336 U.S. 905; *Funkhouser* v. *United States,* 260 F. 2d 86 (C.A. 4), certiorari denied, 358 U.S. 940. The government contends that the failure of the trial courts to comply with Rule 32(a) does not result in an *illegal* sentence within the meaning of Rule 35.

Sentences subject to correction under Rule 35 include those which the judgment of conviction did not authorize,[23] and others in which there is need for bringing an improper sentence into conformity with the law,[24] such as sentences which do not comply with the criminal statutes which authorized them.[25] Thus,

[23] See *United States* v. *Morgan,* 346 U.S. 502; *United States* v. *Bradford,* 194 F. 2d 197 (C.A. 2).

[24] See *Cook* v. *United States,* 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Duggins* v. *United States,* 240 F. 2d 479 (C.A. 6); *Fooshee* v. *United States,* 203 F. 2d 247 (C.A. 5).

[25] See *Bozza* v. *United States,* 330 U.S. 160, 166.

Rule 35 has been applied to provide relief in those situations where the sentence, as disclosed by the record, was in excess of the statutory provision or in some way contrary to the applicable statute.[26] The Rule has not been applied in many other situations said to involve a trial error, even where the invalidity of the sentence is urged to have arisen as a result of facts existing as the time of the pronouncement of sentence.[27]

2. *The history of Rule 35.*—The history of Rule 35 supports the government's contention that the correction it contemplates is that of adjusting a sentence, which is imperfect on the face of the record, to conform to a valid statute.

Prior to the adoption of the Rules, the common law significance of the expiration of a term of court presented many problems.[28] At common law, a court was without power to vacate or alter a sentence unless a proceeding for that purpose was begun during the term. See *United States* v. *Mayer,* 235 U.S. 55;

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[26] See *Callanan* v. *United States*, 364 U.S. 587; *Heflin* v. *United States*, *supra; Holiday* v. *Johnston*, 313 U.S. 342. See also *McIntosh* v. *Pescor*, 175 F. 2d 95 (C.A. 6); *United States* v. *Rader*, 185 F. Supp. 224 (D.C.W.D. Ark.); 4 Barron, *Federal Practice and Procedure* (Rules ed., 1951), Sec. 2301.

[27] See *McIntosh* v. *Pescor*, *supra*, where the defendant was alleged to be insane at the time of sentencing. But see *Byrd* v. *Pescor*, 163 F. 2d 775 (C.A. 8), certiorari denied, 333 U.S. 846. The Rule has specifically been held inapplicable to challenges on grounds involving the denial of the right to counsel (*United States* v. *Morgan*, *supra*), the jurisdiction of the jury and the court (*United States* v. *Bradford*, *supra*), the technical sufficiency of indictments (*Cook* v. *United States*, *supra*), and the voluntariness of a plea of guilty (*In re Shepherd*, 195 F. 2d 157 (C.A. 1)).

[28] See *United States* v. *Benz*, 282 U.S. 304.

Lockhart v. *United States*, 136 F. 2d 122 (C.A. 6). In the *Mayer* case,[29] this Court invoked this common law background in holding that, after term, the federal district courts could not set aside or modify their final judgments for errors of law, and could modify their judgments for errors of fact, if at all, only if those errors were of a most fundamental character, such as would render the proceeding itself irregular and invalid. But the rule in the *Mayer* case was never intended to mean that the ending of the term affected the federal district court's power to vacate a sentence which was *illegal*.

A review of the cases involving illegal sentences reveals that judicial considerations of illegality were confined almost solely to situations where the punishment imposed was in excess of the maximum punishment permitted by statute or where two punishments were imposed for the same offense.[30] A court was of course always permitted to correct its records.[31] In at least one instance, the ending of the term was held not to affect the court's power to review a sentence imposed under a statute subsequently declared unconstitutional.[32] Beyond these narrow situations, the courts consistently followed *Mayer* in

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[29] The Court in *Mayer* held that error involving the bias of a juror could not be heard in a federal court by motion after the expiration of the term in which judgment was entered; the remedy, if any, was by writ of error or motion for a new trial.

[30] See, *e.g.*, *Lockhart* v. *United States*, *supra*, and cases cited therein; *Gargano* v. *United States*, 140 F. 2d 118 (C.A. 9); *Bugg* v. *United States*, 140 F. 2d 848 (C.A. 8), certiorari denied, 323 U.S. 673.

[31] See *Nivens* v. *United States*, 139 F. 2d 226 (C.A. 5); compare Rule 36, F.R. Crim. P.

[32] *Waldron* v. *United States*, 146 F. 2d 145 (C.A. 6).

ruling that there is no power to vacate, after term, for such matters as the validity or sufficiency of indictment, trial by jury, representation by counsel, or the like."[23]

At the time of the adoption of the Rules, the Note of the Advisory Committee observed that the first sentence of Rule 35, providing that a court may correct an illegal sentence at any time, "continues existing law." The "existing law" as to illegal sentences stemmed from the common law. At common law, errors of law subject to examination were only those disclosed by the common law record, *i.e.*, the common law judgment roll, which included mainly the indictment, the plea, the verdict and the sentence. See *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2); *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2). As the Court explained in *United States* v. *Mayer*, *supra*, 235 U.S. at 68:

> The errors of law which were * * * subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied "only to that very small number of legal questions" which concerned "the regularity of the proceedings themselves." See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310.

Since the common law record would fail to show that a court had not complied with Rule 32(a), the court

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[23] See *Bugg* v. *United States*, *supra*, and cases cited therein, 140 F. 2d at 850.

would have to go behind that record to look for "illegality", and, in some instances, would have to make determinations of fact, if the issue of a violation of Rule 32(a) were to be permitted to be raised in a Rule 35 proceeding. But Rule 35 was never intended as a remedy for that type of error. As Mr. Justice Stewart stated in his concurring opinion in *Heflin* v. *United States, supra,* 358 U.S. at 422: "[Rule 35] * * * was intended to remove any doubt created by the decision in *United States* v. *Mayer,* 235 U.S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered." Thus, the rule did not enlarge the scope of illegality as it was understood prior to its adoption. To say that a sentence was illegal because of some error of commission or omission of the trial judge at any stage of the proceeding would be incompatible with the whole historical development of the remedy for setting aside an "illegal" sentence, culminating in Rule 35. In the present cases there was a trial error, but the sentence was not "illegal."

II

ON THE BASIS OF THE FILES AND RECORDS, THE TRIAL COURT IN THE MACHIBRODA CASE PROPERLY DENIED PETITIONER'S CONTENTION THAT HIS PLEA OF GUILTY HAD BEEN INVOLUNTARILY MADE AND ACCEPTED IN VIOLATION OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The government does not question petitioner's premise in *Machibroda,* No. 69 (M. Pet. Br. 10–16)—that a guilty plea, if induced by promises which deprive

it of the character of a voluntary act, is void, and that a conviction thereupon may be set aside upon collateral attack. See *Walker* v. *Johnston*, 312 U.S. 275; *Waley* v. *Johnston*, 316 U.S. 101. The government submits, however, that, on the face of the record in the *Machibroda* case, petitioner's bare allegation, that he was induced to enter his plea by the promise of the Assistant United States Attorney, entitles him neither to a hearing nor to relief.

Petitioner, relying upon *United States* v. *Hayman*, 342 U.S. 205, incorrectly assumes that, by the simple expedient of setting out details of conversations he allegedly had with the Assistant United States Attorney, he has raised a substantial issue of fact which entitles him to be produced for a hearing. In *Hayman*, the Court pointed out that the issue raised by the motion under 28 U.S.C. 2255, whether the defendant's attorney had appeared as counsel for a witness with the defendant's knowledge and consent, was not conclusively determined by the files and records in the trial court (342 U.S. at 219), and the government in *Hayman* conceded that the factual issues raised required the movant's presence at a hearing (*id.* at 209). The Court, however, took care to note that a prisoner does not have to be automatically produced in every proceeding, but that his production depended upon the circumstance of each case (*id.* at 222–223). Thus, the *Hayman* case recognized, as does petitioner, that Section 2255 permits summary dismissal if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." See also 28 U.S.C. 2243; *Walker* v. *Johnston, supra*, 312

U.S. at 284. Although sufficient averments of facts contained in a motion must normally be accepted as true, this is so only *"insofar as they are not inconsistent with the record." United States* v. *Sturm,* 180 F. 2d 413, 414 (C.A. 7), certiorari denied, 339 U.S. 986 (emphasis added). To urge otherwise would make the summary dismissal exception in Section 2255 wellnigh meaningless.

1. The district court specifically found that the motion, files and records refuted petitioner's assertions as to his plea. The record supports this finding and leaves no room for doubt that the plea was made deliberately and with understanding. At every one of his several appearances before Judge Kloeb (see the Statement, *supra,* pp. 9–11), petitioner was represented by counsel of his own choice. The offenses were read and explained to him, and the gravity of the crimes noted. Petitioner personally assured Judge Kloeb that he desired to waive indictment and to enter pleas of guilty. As to these matters, Judge Kloeb, in evaluating the motion under 28 USC 2255, could rely not only upon the transcripts but also upon his personal recollection. See *Sanchez* v. *United States,* 256 F. 2d 73 (C.A. 1); *Trumblay* v. *United States,* 278 F. 2d 229 (C.A. 7), certiorari denied, 352 U.S. 931. Moreover, Judge Kloeb had heard petitioner's testimony as to his guilt and had observed his demeanor at Marvin Breaton's trial (see the Statement, *supra,* p. 10). These circumstances taken as a whole justified the judge in finding that, at the time petitioner deliberately entered the plea, he was not induced by promises allegedly made by the Assist-

ant United States Attorney. See, *e.g., Bone* v. *United States,* 277 F. 2d 63 (C.A. 8).

The court's conclusion is reinforced by certain recitations in petitioner's motion which the court of its own personal knowledge concluded were untrue. Thus Judge Kloeb noted in his opinion that he had never received the two letters allegedly apprising the court of the prosecutor's promise, which petitioner asserted he had sent (M.R. 49). Judge Kloeb was influenced in large measure, as he had a right to be, by the letter which he in fact received from petitioner six months after sentencing (M.R. 50–52), which made no mention of the prosecutor's alleged promise to move for reduction of sentence from forty to twenty years within sixty days after sentence but instead asked the court to reduce the forty-year sentence to twenty-five years, and expressed remorse for admitted past transgressions (M.R. 53). (See the Statement, *supra,* pp. 11–12, 14). Under these circumstances, the court's credence would have been stretched to the breaking point if the court had been required to accept as substantial, even for the purpose of ordering a hearing, petitioner's protest, made for the first time three years after be began serving the forty-year sentence, that he had waived indictment and entered pleas of guilty only because the prosecutor had assured him he would get no more than twenty years. See *Williams* v. *United States,* 192 F. 2d 39 (C.A. 5); *United States* v. *Lowe,* 173 F. 2d 346, 347 (C.A. 2); *United States* v. *Harris,* 160 F. 2d 507, 510 (C.A. 2).

2. The purpose of a hearing pursuant to Section 2255 is to permit the prisoner to sustain charges that

have a chance of being upheld, and to enable the court to arrive at the truth. See *Crowe* v. *United States*, 175 F. 2d 799 (C.A. 4). A hearing in the face of the present record could not remotely redound to petitioner's benefit, despite his allegations as to his "deal" with the prosecutor. See *Johnson* v. *United States*, 239 F. 2d 698, 699 (C.A. 6). Significantly, petitioner's grounds and allegations are tailor-made to meet his lack of supporting data as well as his inconsistency of conduct. Thus the claim of a "deal"—a matter ordinarily subject to verification—is recited in such a manner that no outside corroboration is possible. His affidavit describing the interviews he had with the Assistant United States Attorney mentions no witnesses and states that his attorney was not to be told, and in his account of government counsel's threat as to what would happen if he did not "keep his mouth shut" he completely rules out his attorney and others as possible sources of corroboration. To hold such allegations to be sufficient or credible enough to require a hearing, when brought years after conviction, would mean that the number of hearings held on motions under Section 2255 would be limited only by the imagination and ingenuity of the prisoners involved. Although the affidavit of the Assistant United States Attorney Condon (see the Statement, *supra*, pp. 13–14) cannot be accepted as determining the facts adversely to petitioner, it does perform the function of showing that the government denies and challenges petitioner's claims. In such circumstances, where the defendant's belated assertions are incapable of corroboration by evidence outside his own testimony and in critical part are

contradicted by the known facts of record, there is applicable the comment of the Sixth Circuit when it met a similar contention that the *Hayman* case required a hearing (*Johnson* v. *United States, supra,* 239 F. 2d at 699):

> We have reached the conclusion that appellant is not entitled to a personal hearing in the district court, for we cannot believe that the Supreme Court intended in its care for the protection of human liberty to impose upon the inferior courts the duty of recalling, years after action in criminal cases, prisoners for rehearings based on obviously nebulous and false accusations. * * *

3. There is no merit in petitioner's argument (M. Pet. Br. 11–13), based upon *Shelton* v. *United States,* 356 U.S. 26, that his conviction must be set aside for failure to comply with Rule 11, F. R. Crim. P. (*supra,* p. 5), which provides that a court "shall not accept the plea [of guilty] without first determining that the plea is made voluntarily with understanding of the nature of the charge." The Rule does not require that a court follow any particular ritual or any special form of words in determining whether a plea be voluntarily made.[24]

The procedure followed by the court in ascertaining whether petitioner fully understood the charges and desired to enter the plea certainly constituted ade-

[24] See *Nunley* v. *United States,* (C.A. 10, No. 6771, decided August 11, 1961); *Kennedy* v. *United States,* 259 F. 2d 883 (C.A. 5); cf. *United States* v. *Davis,* 212 F. 2d 264, 267 (C.A. 7); *United States* v. *Swaggerty,* 218 F. 2d 875 (C.A. 7), certiorari denied, 349 U.S. 959; *United States* v. *Von Der Heide,* 169 F. Supp. 560 (D. D.C.).

quate compliance with Rule 11. See *United States* v. *Davis*, 212 F. 2d 264 (C.A. 7). The charges were read to petitioner in open court and the court received counsel's assurance that they had been discussed with petitioner and petitioner's personal assurances that he himself desired to enter the pleas (see the Statement, *supra*, pp. 9–11).

The distinctions between this case and the *Shelton* case, *supra*, are obvious and numerous. One basic difference is that petitioner, unlike Shelton, was represented by counsel.[35] Moreover, in *Shelton* it was conceded that the prosecutor had promised to recommend leniency in return for a plea of guilty. Further, on the record, it was uncontroverted that Shelton had continually protested his innocence to the Assistant United States Attorney and that the Assistant United States Attorney had told Shelton, before he entered the courtroom, not to "go in there and shoot your mouth off or the Judge may not take your plea." See the government's Memorandum in *Shelton* v. *United States*, No. 223 Misc., Oct. Term, 1957, p. 6. There was also on the record no denial of Shelton's claim that he was ill and that his plea was induced by his long detention in county jails to which he did not wish to be returned, and by the government's refusal to hasten his retrial (after an earlier mistrial) by agreeing to dispense with a jury.

[35] Section 224 of the American Law Institute's Code of Criminal Procedure requires the court to explain to the defendant the consequences of a plea of guilty, before accepting such a plea, only when the defendant is not represented by counsel. Accord, *United States* v. *Shepherd*, 108 F. Supp. 721 (D. N.H.); see *Barber* v. *United States*, 227 F. 2d 431 (C.A. 10); *United States* v. *Sturm*, 180 F. 2d 413, 416 (C.A. 7), certiorari denied, 339 U.S. 986.

The present case is in sharp contrast. Petitioner had experienced counsel. At no time did he claim to be innocent—indeed he testified as to his guilt. The record is devoid of any suggestion that the prosecutor promised leniency or improperly applied pressure or that there might have been a motivating factor, other than a desire to plead guilty, which culminated in the plea which was accepted. In fact, the whole pattern of petitioner's conduct at the time—his act of surrender to the jurisdiction in waiving extradition, his assurances in open court as to his desires, his contrite letter to the court following sentencing—shows voluntariness and volition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court below should be affirmed.

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OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE, 1961